No. 06-1701

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

SOUTHWIRE COMPANY,

Petitioner,

v.

JOHN STEPHEN JANOWICK, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties are:

Petitioner: Southwire Company

Respondents: Century Aluminum Company; John Stephen Janowick, Gary Erwin and Merl Kannapel, on behalf of themselves and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542

CORPORATE DISCLOSURE STATEMENT

Century Aluminum Company is a publicly owned corporation. Its stock symbol is CENX.

INTRODUCTION

This case concerns which of three parties – Century Aluminum Company ("Century Aluminum"), certain beneficiaries of a terminated pension plan ("the Annuitants"), or Southwire Company ("Southwire") – is entitled to certain unanticipated proceeds of an insurance policy ("the proceeds"). In the district court, the parties agreed that the case presents two distinct disputes: one dispute as between the Annuitants and Southwire, and another dispute as between Southwire and Century Aluminum. The parties also agreed that the district court's resolution of the dispute between the Annuitants and Southwire should precede the court's resolution of the dispute between Southwire and Century Aluminum. Unless the district court held, in the first instance, that Southwire prevails over the Annuitants, then the Court need not have addressed the dispute between Southwire and Century Aluminum.

As it happens, the district court did conclude that Southwire is legally entitled to the proceeds as between Southwire and the Annuitants. The court, therefore, proceeded to address the dispute between Southwire and Century Aluminum. In spite of clear contractual language favoring Century Aluminum, the district court concluded that Southwire is entitled to the proceeds over Century Aluminum. Thus, both the Annuitants and Century Aluminum took appeals against Southwire in the United States Court of Appeals for the Sixth Circuit.

As in the district court, the Sixth Circuit properly considered the case as presenting two distinct disputes, one of which precedes the other. Unlike the district court, however, the Sixth Circuit held that the Annuitants are entitled to the proceeds over Southwire. The Sixth Circuit properly noted that its decision mooted Century Aluminum's

arguments on appeal. Century Aluminum's entitlement to any proceeds derives from the fact that it bought the right to such proceeds from Southwire. If Southwire never had the right to sell the proceeds in the first instance, then Century Aluminum could not have bought them from Southwire.

Southwire now petitions for this Court's review of the decision of the Sixth Circuit. The legal questions presented by Southwire concern, generally, which of two parties has the greater entitlement to excess proceeds of a terminated pension plan: the employer who established the plan, or the employee beneficiaries under the plan. Century Aluminum has not briefed these issues in either the district court or the Sixth Circuit. The issues have no bearing on whether, assuming Southwire is entitled to the proceeds, Century Aluminum bought the proceeds from Southwire. Thus, strictly speaking, Century Aluminum takes no position on whether this Court should grant or deny Southwire's petition for a writ of certiorari.

However, Century Aluminum is aware of this Court's admonition that all parties of record must correct "any perceived misstatement made in the petition" or else risk having any objection to such misstatement deemed waived. (*See* Supreme Court Rule 15.2.) That being said, Century Aluminum notes that Southwire's petition contains two pervasive misstatements that cannot go uncorrected. Century Aluminum will correct those misstatements in a brief counter-statement of the case.

COUNTER-STATEMENT OF THE CASE

In order to put Southwire's misstatements in context, Century Aluminum will very briefly explain the background of this case.

In 1970, the National Southwire Aluminum Company ("NSA"), a subsidiary of Southwire, established the National

Southwire Aluminum Company Pension Plan ("the Plan") for the benefit of its employees. NSA funded the plan solely with its own funds, not Southwire's. As a subsidiary of Southwire, NSA maintained a separate legal existence and received no assistance from Southwire with creating, managing or funding the Plan in any way. (App. 2.)

In 1986, NSA terminated the Plan. In order to properly terminate the Plan in accordance with ERISA law and fully relieve itself of all obligations thereunder, NSA directed the trustee of the Plan (Irving Trust) to purchase annuity contracts to fully fund the benefits due the former beneficiaries under the Plan. At that time, the NSA employees formerly participating in the Plan became Annuitants under insurance contracts held in trust rather than participants under an ERISA plan. Southwire had absolutely no involvement in the termination of the Plan or the purchase of the annuity contracts. Those steps were taken solely by its subsidiary NSA. (App. 3.)

From 1986 to 2001, NSA changed corporate form several times. In April 2001, Century Aluminum bought the former NSA from Southwire. (App. 4.) The parties memorialized the sale of the former NSA in a Stock Purchase Agreement. Under the Stock Purchase Agreement, Century Aluminum acquired all assets, intangible and tangible, of every kind or nature whatsoever, of the former NSA. (App. 7-9.) Thus, it could not be clearer, as a matter of pure contractual interpretation, that if the former NSA had any right to unanticipated proceeds, Century Aluminum bought that right when it bought the former NSA from Southwire.

The foregoing briefly addresses the factual background and legal underpinning of the dispute as between Century Aluminum and Southwire. Century Aluminum will now address Southwire's two pervasive misstatements.

The first misstatement is Southwire's insistence on claiming that **it**, not its subsidiary **NSA**, created and bore responsibility for the Plan. This claim appears repeatedly throughout Southwire's petition as if it were fact. (See Parties to the Proceeding, wherein Southwire states the Plan was "funded solely by Southwire"; see also Statement of the Case, p. 4, where Southwire claims it "bore the entire cost of the Plan.") To the contrary, Southwire did **not** fund the Plan, did **not** terminate it, and did **not** arrange for the purchase of the annuity contracts. NSA took all of these steps, and, as such, Century Aluminum bought NSA's right to unanticipated proceeds from the annuity contracts when it bought the former NSA. (App. 1.)

The second misstatement is Southwire's characterization of the sale of the former NSA to Century Aluminum in 2001. Southwire attempts to limit the amount and kind of assets Century Aluminum bought by stating that Century Aluminum simply bought an "aluminum smelting plant." (See Parties to the Proceeding; see also Statement of the Case, p. 7 n.4.) The implication of this is that Century Aluminum bought a building and some equipment. In truth, the broadly-worded Stock Purchase Agreement supplied an all-inclusive definition of the assets that Century Aluminum purchased:

> **all of the assets**, properties, including real and personal property, whether **tangible or intangible**, and the rights which are used or intended for use in or in connection with the Business . . . and with respect to contract rights . . . **all contracts, agreements and other arrangements** used or intended to be used in or relating to the conduct of the Business . . . the Assets, include without limitation the following: . . . (vii) all claims, causes of action, choses in action, rights of recovery and rights of setoff of any kind (**including rights to**

> **insurance proceeds**) . . . pertaining to, or arising out of, the Business and inuring to the benefit of the Seller or any of its Affiliates . . . (x) all of Seller's and its Affiliates rights, title and interest in, to and under all other assets, rights and claims of every kind and nature used in the Business.

(App. 7-9.) (Emphasis supplied.) This language places **no limits** on the amount or nature of assets Century Aluminum purchased. Pursuant to this clear contractual language, Century Aluminum purchased the right to the proceeds at issue from Southwire.

ARGUMENT

Century Aluminum takes no position on whether the Court should grant the Petition.

CONCLUSION

Century Aluminum tenders this Brief in Opposition for the purpose of correcting misstatements in Southwire's Petition. Century Aluminum takes no position on whether the Court should grant the Petition.

Respectfully submitted,

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CASE NO. 05-6456

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTURY ALUMINUM COMPANY,
Defendant-Appellant;

BANK OF NEW YORK,
as former Trustee for National-Southwire Company Pension Plan,
Plaintiff;

SOUTHWIRE COMPANY,
Defendant-Appellee

v.

JOHN STEPHEN JANOWICK,
on behalf of himself and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542, et al,
Defendants

On Appeal from the United States District Court for the Western District of Kentucky, No. 4:03-cv-00020-JHM

FINAL BRIEF OF DEFENDANT-APPELLANT CENTURY ALUMINUM COMPANY

(Filed Mar. 15, 2006)

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Oral Argument Requested

* * *

STATEMENT OF FACTS

In 1970, NSA, a subsidiary of Southwire, established the National Southwire Aluminum Company Pension Plan ("the Plan") for the benefit of its employees. (R. 62, Mem. and Op. and Order at 2, J.A. 772.) NSA funded the plan solely with its own funds. (*Id.*; R. 58-59, Opp. to Mot. for Sum. J. and Mem. re Mot. For Sum. J. at Exh. 1.) As a subsidiary of Southwire, NSA maintained a separate legal existence and received no assistance from Southwire with creating or managing the Plan in any way from inception to termination. (R. 62, Mem. and Op. and Order at 2, J.A. 772.)

Because the Plan constituted a qualified retirement plan and trust under the Employee Retirement Income Security Act of 1974 ("ERISA"), ERISA law obligated NSA to place the Plan assets in a trust ("the Trust"). (*Id.*) That trust was managed by Irving Trust Company, predecessor in interest to BONY, as Trustee for the benefit of the Plan participants. (*Id.* at 3, J.A. 773.) If at any time the Plan lacked sufficient assets, NSA bore sole responsibility for providing the funds necessary to meet the Plan obligations. (*Id.*)

In 1986, NSA terminated the Plan. (*Id.*) In order to properly terminate the Plan in accordance with ERISA law and fully relieve itself of all obligations thereunder, NSA directed Irving Trust, as Trustee of the Plan, to use Plan assets to purchase from Prudential Insurance Company of America ("Prudential") two group annuity contracts to satisfy all benefit liabilities under the Plan to former Plan participants. (*Id.*) The Prudential contracts, GA-5542 and GA-5543 (the "Annuity Contracts") were purchased to fully fund the benefits due the former beneficiaries under the Plan. (*Id.*)

Thus, the NSA Plan ended in 1986. The NSA employees formerly participating in the Plan had become Annuitants under insurance contracts held in trust rather than participants under an ERISA plan. (*Id.*) From 1986 onward, the Annuitants looked solely to the Prudential contracts, held in trust by the contract-holder Irving Trust (later, BONY), for their benefits. (*Id.*) NSA had fully satisfied its obligations under the Plan, and, after 1986, NSA had no conceivable liabilities or foreseeable benefits related to the terminated Plan. (*Id.*; R. 38, Mot. for Part. Sum. J. at 3-4, J.A. 54-55.)

Some years later, NSA's parent corporation, Southwire, became more involved in the management and control of NSA. Among other things, Southwire merged the last remaining NSA-sponsored pension plan into Southwire's retirement plan, and assumed the role of providing employee benefits administration to employees. (R. 57, Mot. for Sum. J. at 6.)

All of these events, of course, occurred years after the NSA Plan, which NSA created, funded, and terminated completely by itself, had ceased existence. Southwire

never purported to have any involvement – no benefits nor liabilities whatsoever – in the NSA Plan terminated in 1986.

From 1986 to 2001, NSA changed form several times (R. 56, Mot. for Sum. J. at 6-7, Exh. 1, J.A. 580-581, 587-607.) As of April 2001, what had been NSA in 1986 had now become NSA Ltd., a limited partnership owned by Skyliner, Inc., which was owned by Metalsco, Ltd. (*Id.*) When Century Aluminum acquired Metalsco, Ltd., in April, 2001, it thus acquired the former NSA. (*Id.*)

A few months later, what the District Court described as a "windfall" accrued from the Annuity Contracts the former NSA had purchased in 1986. (R. 49, Mem. and Op. at 3, J.A. 567; R. 62, Mem. and Op. and Order at 4, J. A. 774.) Like many other insurance companies at the time, in 2001 Prudential demutualized and became a publicly traded company. (R. 62, Mem. and Op. and Order at 4, J. A. 774.) This meant that Prudential converted its capital structure from that of a mutual insurance company to that of a stock company. (*Id.*) As part of this demutualization, Prudential issued common stock ("the demutualization proceeds," or "the proceeds") to its policyholders, including BONY, contract-holder of the Annuity Contracts NSA had purchased long ago. (*Id.*)

Because the Annuity Contracts were entered into in 1986, well before the wave of demutualization in the industry, no one anticipated that a demutualization might occur and the contracts do not specify who would be entitled to any demutualization proceeds attributable to the Annuity Contracts. (R. 49, Mem. and Op. at 3, J.A. 567.) The proceeds were unanticipated. (*Id.*) Therefore, in 2002, the designated contract holder, BONY advised

Prudential that BONY had no interest in, or right to, the demutualization proceeds. (R. 62, Mem. and Op. and Order at 3, J. A. 773.) After learning that the Annuitants, Southwire and Century Aluminum all claimed an interest in the demutualization proceeds, BONY liquidated the shares of stock, deposited what has grown to $1,357,703.69 into the Court's registry and filed the underlying interpleader action to resolve the conflicting claims. (*Id.*)

Century Aluminum, as the purchaser of the assets of NSA, now asks this Court to reverse the District Court and hold that Century Aluminum is entitled to the proceeds.

STOCK PURCHASE AGREEMENT

THIS STOCK PURCHASE AGREEMENT (the "Agreement") is made this 31st day of August, 2000, by and between CENTURY ALUMINUM COMPANY, a Delaware corporation ("Purchaser"), and SOUTHWIRE COMPANY, a Delaware corporation ("Southwire" or "Seller").

BACKGROUND

A. Metalsco Ltd. ("Metalsco"), a Georgia corporation, is a wholly-owned subsidiary of Southwire.

B. Skyliner, Inc. ("Skyliner"), a Delaware corporation, is a wholly-owned subsidiary of Metalsco.

C. NSA, Ltd. ("NSA") is a limited partnership, whose only partners are Metalsco and Skyliner.

D. Through NSA, together with certain properties and assets owned by Southwire, Southwire conducts the Business (as defined herein).

E. Purchaser desires to purchase, either directly or through an entity established for the purpose, from Seller, and Seller desires to sell to Purchaser, the Business, and to such purpose, Purchase shall acquire from Seller on the Closing Date all of the then authorized, issued and outstanding capital stock of Metalsco (the "Shares") and certain properties and assets necessary for the operation of the Business, and Seller shall assign to Purchaser and Purchaser shall assume certain liabilities related to the operation of the Business, all as more fully described herein, upon the terms and subject to the conditions set forth herein.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and of the mutual covenants, agreements, representations, and warranties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, each intending to be legally bound, agree as follows:

* * *

3.13 Assets.

(a) Except as set forth on *Schedule 3.13*, Seller or NSA, as the case may be, owns, leases or has the legal right to use all of the assets, properties, including real property and personal property, whether tangible or intangible, and rights which are used or intended for use in or in connection with the Business, including, without limitation, the Owned Intellectual Property, the Licensed Intellectual Property, the Real Property and any other tangible personal property, used or intended to be used in the conduct of the Business, and, with respect to contract rights, is a party to and enjoys the right to the benefits of all contracts, agreements and other arrangements used or intended to be used in or relating to the conduct of the Business, except as enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other Legal Requirement affecting creditors' rights generally and by other equitable principles, including, without limitation, those limiting the availability of specific performance, injunctive relief and other equitable remedies. Other than the Additional Assets, which are owned or held by Seller as of the date hereof and will be transferred to Purchaser or an Affiliate or assignee of Purchaser designated by Purchaser on the Closing Date, all of the assets

described in the immediately preceding sentence are owned or held by NSA as of the date hereof. All such assets, properties and rights used or intended for use in the Business, including without limitation the Additional Assets, are hereinafter referred to as the "Assets." Except as provided in Section 3.13(b), the Assets include, without limitation, the following:

(i) the Plant, including the Real Property;

(ii) all furniture, fixtures, equipment, machinery, spare parts, packaging materials, oil and other tangible personal property used or held for use by Seller, Metalsco, Skyliner or NSA at the Plant or any other location at or from which the Business is conducted or otherwise owned or held by Seller and its Affiliates for use in the Business;

(iii) all vehicles and transportation equipment used or intended for use in the Business, all of which are identified on *Schedule 3.13(a)(iii)* attached hereto;

(iv) all Inventories and Receivables of the Business;

(v) the goodwill of Seller and its Affiliates relating to the Business;

(vi) all of Seller's and its Affiliates' right, title and interest in, to and under the Owned Intellectual Property and the Licensed Intellectual Property used in, or relating to, the Business;

(vii) all claims, causes of action, choses in action, rights of recovery and rights of set-off of any kind (including rights to insurance proceeds and rights under and pursuant to all warranties, representations and guarantees made by suppliers of products, materials or equipment, or components thereof),

pertaining to, or arising out of, the Business and enuring to the benefit of the Seller or any of its Affiliates;

(viii) all rights of the Seller and its Affiliates under all contracts, including without limitation Material Contracts, licenses, sublicenses, agreements, leases, commitments, and sales and purchase orders, and under all commitments, bids and offers (to the extent such offers are transferable), used in, or relating to, the Business;

(ix) all municipal, state and federal Permits, franchises, licenses, agreements, waivers and authorizations held or used by Seller or any of its Affiliates in connection with, or required for, the Business, to the extent transferable; and

(x) all of Seller's and its Affiliates right, title and interest held to and under all other assets, rights and claims of every kind and nature used in the Business.

Except as set forth on *Schedule 3.13*, Seller or NSA, as the case may be, has and NSA will have as of the Closing Date good and marketable title to, or, in the case of leased or subleased Assets, valid and subsisting leasehold interests in, all the Assets, free and clear of all Encumbrances, except for Permitted Encumbrances.

(b) Notwithstanding anything to the contrary contained in this Agreement or any Exhibit hereto or any Schedule furnished hereunder, the Assets shall not include, and neither Purchaser nor any Affiliate of Purchaser shall acquire any interest in, any of the following assets of or related to the Business:

(i) All claims, causes of action, choses in action, right of recovery and rights of set-off of any kind

(including rights to insurance proceeds and rights under and pursuant to all warranties, representations and guarantees) pertaining to or arising out of the Business, with respect to any event or occurrence prior to the Closing Date, that are listed on *Schedule 3.13(b)* (as of the date of this Agreement or supplementally prior to the Closing Date) which (x) have been asserted on or prior to the Closing Date by Seller or any of its Affiliates and (y) which seek to recover fro the account or benefit of Seller or any of its Affiliates all or a portion of any loss, cost, damage, expense or liability actually suffered or incurred by, or any amounts actually paid in repair, remediation, reconstruction or settlement (in each case, including reasonable attorneys' and consultants' fees) by, Seller or any of its Affiliates and not reflected as an asset on the Closing Balance Sheet;

(ii) all credits with respect to patronage capital owed to Seller or any of its Affiliates by Kenergy under the Power Contract for the time period up to and including the Closing Date;

(iii) the Closed Potliner Disposal Areas; and

(iv) the equipment comprising the Current Groundwater Recovery and Treatment System.

(c) The Assets, including the Material Contracts (taken together with the Shared Services Agreement, the Environmental Access and Cooperation Agreement, the Aluminum Supply Agreement and the Power Supply Agreements) constitute all the properties, assets and rights as are necessary in and for the conduct of the Business as presently conducted Except as set forth on Schedule 3.13(c), all of the Assets with a replacement value in excess of $5,000 and that (other than replacement parts or equipment) have been used in the Business

during the last twelve (12) months are and will be as of the Closing Date in good repair and operating condition and suitable for the purposes for which they are used or intended without the necessity of any repairs, the costs of which are reasonably likely to exceed with respect to any such Asset individually $10,000 or with respect to all such Assets $25,000 in the aggregate, and, since the date of the Reference Balance Sheet, Seller has and will have as of the Closing Date caused the Assets to be maintained in accordance with NSA's normal maintenance standards consistent with past practice of the Business.

* * *